

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

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Date:
January 13, 2012

Legend:

Taxpayer =

State A =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 1 =

a =

b =

c =

d =

e =

Dear :

This is in reply to a letter dated October 17, 2011, requesting a ruling on behalf of Taxpayer. You requested a ruling that the distribution described below will qualify for the dividends paid deduction under § 562 of the Internal Revenue Code.

Facts:

Taxpayer is a publicly traded State A corporation that has elected under § 856(c) to be treated as a real estate investment trust (REIT) for federal income tax purposes. Taxpayer specializes in the acquisition, asset management, development and redevelopment of neighborhood and community shopping centers located in metropolitan areas across the United States.

On Date 2, Taxpayer declared a distribution for the first quarter of Year 1 (Q1 Distribution) in the amount of \$a per share, payable on Date 4, to shareholders of record of common stock as of Date 3. Taxpayer represents that based on the applicable state law, the Q1 Distribution was validly declared.

Prior to the declaration of the Q1 Distribution, on Date 1, Taxpayer closed a transaction (the Transaction) with a third-party (the Joint Venture Partner) which involved the formation and investment in a new joint venture (the Joint Venture) as well as the investment by the Joint Venture Partner in publicly traded and non-traded shares of Taxpayer's common stock. The Joint Venture Partner's investment in the publicly traded common shares (the Common Shares) and the non-traded shares of Taxpayer's common stock was made pursuant to a Subscription Agreement.

The Subscription Agreement provided for the Joint Venture Partner to acquire the Common Shares in exchange for the subscription price on a per share basis and an additional amount due to Taxpayer if the Transaction closed on or after the first day of the first quarter of Year 1 but on or before the record date declared by Taxpayer's board of directors for the payment of the regular quarterly dividend. The additional amount (the Distribution True-Up) was intended to compensate Taxpayer for the excess portion of the full quarterly distribution payable with respect to its common stock which represented the number of days in the quarter on which the newly issued shares acquired by the Joint Venture Partner were not outstanding. Taxpayer and the Joint Venture Partner agreed that, economically, the Joint Venture Partner was not entitled to the portion of the quarterly distribution allocable to those days in the quarter prior to the date on which the shares were issued to the Joint Venture Partner. The Distribution True-Up was approximately \$b and was due and payable by the Joint Venture Partner on Date 1.

As mentioned above the Joint Venture Partner also acquired c share(s) of convertible stock issued by Taxpayer (the Common Convertible Stock). The Common Convertible Stock is a class of Taxpayer's common stock that entitles the holder to voting rights and the right to receive distributions, on a pari passu basis with other

common shares, in an amount equal to the same distribution payable with respect to the shares into which it could be converted. The Common Convertible Stock is not publicly traded like Taxpayer's other common stock, but it is convertible into d share(s) of Taxpayer's publicly traded common stock upon the occurrence of certain events.

Taxpayer paid the full Q1 Distribution to the Joint Venture Partner with respect to the Common Shares. The Joint Venture Partner was also entitled to \$e of dividends with respect to the Common Convertible Stock (the Convertible Stock Dividends). However, because the amount of the Q1 Distribution True-Up due from the Joint Venture Partner exceeded the amount of the Convertible Stock Dividends due to the Joint Venture Partner, the Joint Venture Partner owed a net amount to Taxpayer. Taxpayer contends that the Convertible Stock Dividends were constructively paid to the Joint Venture Partner on Date 4 because such dividends reduced the Q1 Distribution True-up that the Joint Venture Partner owed to Taxpayer by \$e. Taxpayer also represents that it will treat the dividend of \$e paid to the Joint Venture Partner as a dividend (to the extent of available earnings and profits) for all purposes of the Code and regulations.

Law and Analysis:

Section 857(a) provides that in order to be taxed as a REIT, the deduction for dividends paid (as defined in section 561 and determined without regard to capital gains dividends) must equal or exceed the sum of (1) 90 percent of the REIT's taxable income (determined without regard to the dividends paid deduction) and (2) 90 percent of the excess of the net income from foreclosure property over the tax imposed on that income.

Section 857(b)(2)(B) provides that in determining REIT taxable income, the deduction for dividends paid (as defined in section 561) shall be allowed.

Section 561(a) provides that the deduction for dividends paid shall be the sum of the dividends paid during the year, and the consent dividends for the taxable year.

Section 562(a) provides that the term "dividend" shall include only dividends described in section 316.

Section 562(c) provides that the amount of any distribution shall not be considered as a dividend for purposes of computing the dividends paid deduction, unless such distribution is pro rata, with no preference to one class of stock as compared with another class, except to the extent that the former is entitled to such preference.

Section 1.562-2(a) of the Income Tax Regulations provides that a corporation will not be entitled to a deduction for dividends paid with respect to any distribution upon a

class of stock if there is distributed to any shareholder of such class (in proportion to the number of shares held by him) more or less than his pro rata part of the distribution as compared with the distribution made to any other shareholder of the same class. Nor will a corporation be entitled to a deduction for dividends paid in the case of any distribution upon a class of stock if there is distributed upon such class of stock more or less than the amount to which it is entitled as compared with any other class of stock. A preference exists if any rights to preference inherent in any class of stock are violated. The disallowance, where any preference in fact exists, extends to the entire amount of the distribution and not merely to a part of such distribution.

For purposes of this ruling, we are assuming that the Convertible Stock Dividends are dividends that qualify under § 316. At the time of the Q1 Distribution, the Joint Venture Partner owed Taxpayer the Distribution True-Up. The amount that would be distributed as the Convertible Stock Dividends was reflected in the reduced amount currently owed from the Joint Venture Partner to Taxpayer as a result of the Distribution True-Up. Accordingly, the Convertible Stock Dividends are not preferential within the meaning of § 562 and the Q1 Distribution will qualify for the dividends paid deduction under § 562 provided Taxpayer has sufficient earnings and profits.

Except as specifically ruled upon above, no opinion is expressed concerning any federal income tax consequences relating to the facts herein under any other provision of the Code. Specifically, we do not rule whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1 of the Code. Furthermore, we express no opinion as to whether the distribution qualifies as a dividend under § 316.

This ruling is directed only to the taxpayer requesting it. Taxpayer should attach a copy of this ruling to each tax return to which it applies. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited as precedent.

Sincerely,

Jonathan D. Silver _____
Jonathan D. Silver
Assistant Branch Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)